

RE-DEFINING AFGHANISTAN'S PRESIDENTIAL PARDON LAW AND PROCEDURES

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ABSTRACT

The Afghan Constitution and the Afghan Criminal Procedure Act (“ACPA”) authorize Afghanistan’s President to grant pardons or reduce criminal punishment. However, the Afghan Constitution and ACPA do not specify a method or mechanism for how Afghanistan’s President may exercise his power. As a result, Afghanistan’s President has been granting pardons through pardon decrees. The Afghanistan Constitution and ACPA’s broad language has allowed corruption and enabled the President to undermine the judiciary. This article recommends for Afghanistan’s government to amend its constitution and ACPA. The amendments should formalize and specify the method and mechanisms for the President’s pardon power; thereby promoting respect for the rule of law and the judiciary. This article also proposes for Afghanistan’s government to establish an independent pardon board to review petitions and recommend eligible requests to the President.

This article suggests that Afghanistan’s pardon procedures combine the methods used by Iran and Washington State. These methods are demonstrated in sources such as the Iranian Code, the Revised Code of Washington, and the Bylaws of the Washington State Clemency and Pardon Board. This amalgam of approaches would be both practical and appropriate for Afghanistan’s socio-political context, striking a balance between progressive Western methods and an Islamic

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Republic's successful methods. This article also explains Afghanistan's current laws relating to presidential pardon power and exposes how the current system leads to corruption and the pardon's misuse. Next, the article will discuss how Iran and Washington State regulate their pardon power. In analyzing Iran and Washington State's methods, the article will suggest specific amendments to Afghanistan's laws. These specific amendments would (1) modify the President's pardon power, (2) limit the scope of this power, (3) establish an independent board that restricts the pardon power, and (4) authorize this board to recommend pardons or punishment reductions to Afghanistan's President. Finally, this article will address the potential criticisms and challenges to its proposed model, such as limiting the presidential and executive power and authority.

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INTRODUCTION

Afghanistan's government has released many criminals convicted of various heinous crimes.¹ Such release was done through several presidential pardon decrees and Afghanistan's peace agreement with Hezb-e-Islami Afghanistan ("HIA"),² which translates to the

1. Jawid Hassanzada, *198 Zendani Hezb-i-Islami Az Zendan Hai Pul-i-Charkhi Wa Bagram Hazad Shodand* [198 HIA Prisoners were Released from Afghanistan's Pul-e-Charki and Bagram prisons], AZADI RADIO.COM (June 14, 2018) <https://da.azadiradio.com/amp/29290406.html> [hereinafter *Zendani Hezb-i-Islami*].

2. *Id.*

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("ACPA") authorize the President to reduce sentences or pardon convictions.⁷ However, the language in both sources are broad, failing to specify the method, procedures, or mechanisms for the President to exercise his pardon power.⁸ As a result, the President has been unrestrained in using presidential decrees for granting pardons or reducing sentences. The discretionary nature of this pardon power and process can lead to corruption, which enables circumvention of accountability and encroaches on judicial power. To address this problem, this article recommends for Afghanistan to amend its constitution and ACPA. The amendments would emulate jurisdictions where clemency statutes and rules are clear, which would effectively prevent corruption and political abuse.

Part II of this article suggests that Afghanistan's pardon procedures combine the methods used by Iran and Washington State. These methods are demonstrated in sources such as the Iranian Code, the Revised Code of Washington, and the Bylaws of the Washington State Clemency and Pardon Board. This amalgam of approaches would be both practical and appropriate for Afghanistan's socio-political context, striking a balance between progressive Western methods and an Islamic Republic's successful methods. Iran and Washington State's methods are good examples because they are aligned with international standards of good governance.

In Iran, pardon requests are reviewed by a five-judge committee in Tehran and a provincial committee in each province.⁹ If either committee approves a request finding the applicant eligible, then the pardon is proposed for confirmation from the Supreme Court to the Islamic Revolution Leader, Rabar-e Enqelab Islami.¹⁰ Specifically, the respective committee first examines all of the documents contained in

7. QANUNI ASSASI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN], THE OFFICIAL GAZETTE OF AFGHANISTAN 818, 1383 [2004], art. 64 § 18. A pardon forgives a defendant of a crime, while commutation reduces a defendant's sentence. BRYAN A. GARNER, BLACK'S LAW DICTIONARY 1286-87 (10th ed. 2014).

8. See QANUNI ASSASI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN], THE OFFICIAL GAZETTE OF AFGHANISTAN 818, 1383 [2004], art. 64 § 18; see also 2014 *Criminal Procedure Act* *supra* note 6, art. 348.

9. Hahin Namae Kamesyoun Haf wa Takhfif Majazat Makumen [Regulation of the Pardoning and Reducing the Punishment of Convicts] Tehran 1387 [2008] (Iran) arts. 2-4. [hereinafter 2008 *Iranian Pardoning Regulation*].

10. *Id.* art. 15.

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the petition to pardon or reduce punishment.¹¹ During this stage, the committee must determine whether the petitioner has been rehabilitated, and whether the pardon or punishment reduction is beneficial for society and the government.¹² Then, the Supreme Court supervises, provides oversight, and prevents further injustice.¹³

Like Iran, Washington State follows procedures that add structural safeguards to the pardon process. There, the Clemency and Pardon Board hears a petitioner in a regular or special hearing process before recommending a pardon to the Governor.¹⁴ This approach works well in Washington State because its State Constitution, Revised Code, and Clemency and Pardon Board Bylaws use clear language. Washington's laws clearly define each officials' authority and responsibilities and describe how a convict may seek a pardon or punishment reduction.¹⁵ Similar to Iran's model, experienced professionals review and consider the special circumstances of each Washington State pardon petition. These professionals determine whether a convict has been rehabilitated and is ready to rejoin the community.¹⁶ In addition, Washington State publicly reviews pardons and punishment reductions.¹⁷ By sharing pardon reviews to the public, Washington State reinforces the finding's accountability and reliability, promotes transparency, and prevents corruption.

Pardon procedures should include characteristics from Iran and Washington State's models. This article emphasizes that Afghanistan should carefully protect judiciary independence by incorporating Iran and Washington's procedures, which avoids undermining judicial decisions.

11. 2008 Iranian Pardoning Regulation, *supra* note 9, art. 2,4,15

12. *Id.* art. 24.

13. *Id.* art. 30.

14. CLEMENCY AND PARDONS BOARD, BYLAWS OF THE WASHINGTON STATE CLEMENCY AND PARDONS BOARD, arts. 1 §1.02, 3 § 3.01-3.02 (Mar. 22, 2011).

15. *Id.* art. 2 §2.05-2.07.

16. 2008 Iranian Pardoning Regulation, *supra* note 9, art. 2

17. STATE OF WASHINGTON OFFICE OF THE GOVERNOR, Washington State Clemency & Pardons Board Policies 3 (2012) at 5. <https://www.digitalarchives.wa.gov/GovernorGregoire/clemency/documents/policies.pdf>. [hereinafter *Washington Clemency & Pardons Board Policies*]; Bylaws of Clemency and Pardons Board, *supra* note 14, at art. 3 § 3.01.

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To support this claim, this article describes Afghanistan's current pardon laws and procedures, and describes how corruption leads to misuse of pardons. Then, this article accounts for Afghanistan's current political climate, which includes the tensions caused by the National Unity Government, the roles and powers of each branch, and how these branches relate to the President's pardon power. Next, this article explains how the current Afghan regime approaches the pardon process; an approach that is susceptible to and has been used to perpetuate corruption. The following sections discuss and compare how Iran and Washington State handle the same issues. Those sections will then examine and critique Iran and Washington's procedures for the purpose of determining a legal reform model for Afghanistan.

Part III of this article also suggests specific amendments to the ACPA and Afghanistan's Constitution. The amendments specifically propose for the creation of explicit provisions that define the President's authority and a statute establishing an independent pardon board and process. Additionally, these amendments would empower a pardoning board to promulgate regulations that implement the process. The proposed board would be charged with drafting procedures for issuing pardons and reducing sentences. These procedures should clarify who can request the pardons and under which circumstances to approve pardons. Finally, this article will address the potential criticisms and challenges to its proposed model, such as limiting the presidential and executive power and authority.

I. UNDERSTANDING THE PRESIDENT'S PARDON POWER IN AFGHANISTAN

A. *Peace Agreement with Hezb-e-Islami Afghanistan*

From 2001 to 2016, HIA fought against Afghanistan's government in an armed conflict before reaching a peace agreement.¹⁸ During that period, Afghanistan's government negotiated a peace agreement with

18. Nesar A. Khelwatgar, *Dornomai Seyasee Gulbuddin Hekmatyar* [Political Perspective of Gulbuddin Hekmatyar], SALAM WATANDAR (Dec. 11, 2018) <https://swn.af/uzbeki/Article.aspx?a=43409>; Mohammad Q. Erfani, *Sulh Ba Hekmatyar Che Tasire Bar Hawzai Afghanistan Gozashta?* [How Did Peace with Hekmatyar Affect the Situation in Afghanistan?], BBC NEWS (Sept. 3, 2018), <https://www.bbc.com/persian/amp/afghanistan-45397256>.

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the HIA but failed.¹⁹ Surprisingly, after the 2014 election, the armed HIA group accepted the peace request and began negotiating with Afghanistan's government.²⁰ In September 2016, after two years of negotiation, HIA and Afghanistan's government finally signed a peace agreement.²¹

Under Article Five of the Peace Agreement, Afghanistan's government promised to ask the United States and United Nations to remove HIA's leader, Gulbuddin Hekmatyar, and other members of his party from the international "blacklist" and sanctions list.²² Eight months after the Afghan government committed to and signed the agreement, Hekmatyar returned to Nangarhar and Kabul.²³ Since then, Hekmatyar's political party has participated in preliminary elections and Hekmatyar has been preparing to participate in next year's presidential election.²⁴

In Article Eleven of the peace agreement, Afghanistan's government promised to release only the HIA prisoners "who have not committed criminal crimes and there would be no personal claims by certain individuals against them."²⁵ However, recent reports show Afghanistan's government released 463 HIA prisoners who were

19. Aimal Faizi, *Afghans Must Support Peace Deal with Hekmatyar*, ALJAZEERA (Oct. 16, 2016) <https://www.aljazeera.com/amp/indepth/opinion/2016/10/afghans-support-peace-deal-hekmatyar-161013141501350.html>.

20. *Hekmatyar to Surface Once Peace Deal is Enforced: HIA*, PAJHWOK AFGHAN NEWS (Jan. 5, 2017), <https://www.pajhwok.com/en/2017/01/05/hekmatyar-surface-once-peace-deal-enforced-hia>.

21. *Id.*

22. *Id.*

23. Jennifer Hauser & Ivan Watson, *Afghan Warlord Returns to Kabul After Nearly 20 Years*, CNN (May 9, 2017), <https://www.cnn.com/2017/05/04/asia/afghan-warlord-hekmatyar-returns-to-kabul/index.html>.

24. Hamed Nazari, *Hekmatyar Says His Party Will Elect Next President*, TOLO NEWS (Aug. 5, 2017), <https://www.tolonews.com/index.php/afghanistan/hekmatyar-says-his-party-will-elect-next-president>.

25. Mohammad Ameen Karim, *Full text of Agreement between the Government of Islamic Republic of Afghanistan & Hezb-e-Islami of Afghanistan Led by Gulbuddin Hekmatyar*, CTR. FOR RES. & SECURITY STUD. (Oct. 5, 2016), <https://crss.pk/story/full-text-of-agreement-between-the-government-of-islamic-republic-of-afghanistan-goira-hezb-e-islami-of-afghanistan-led-by-gulbuddin-hekmatyar/> [hereinafter *Full Text of Peace Agreement with HIA*].

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convicted of various crimes.²⁶ Following the prisoners' release, "human rights organizations criticized the government for agreeing to the move stating that the political prisoners had been involved in insurgency incidents that killed civilians."²⁷ Throughout the year, the President regularly releases convicts through pardon decrees²⁸ without applying procedures and examining whether they are no longer a danger to society.²⁹

B. The Legal Landscape of the Pardon Power

The President's current pardon power enables corruption because his power goes unchecked. Afghanistan's Constitution and the ACPA fail to adequately describe the methods or mechanisms for issuing pardons.³⁰ Article 64 §18 in Afghanistan's Constitution provides the President with pardon power by stating he shall exercise it under the law's provisions.³¹ The ACPA does not contain any provisions specifying the procedure or mechanisms allowing the President to implement his pardon power.³² Therefore, this broad language leaves the door open for the President to issue pardons without a mechanism to check him.

26. 75 *Uzwe Hezb-e Islami Hekmatiyar Az Zendan Pul-e Charkhi Hazad Shodand* [75 members of Hekmatyar's Islamic Party prisoners were released from Pul-e Charkhi Prison], BBC NEWS (Jan. 11, 2018), <http://www.bbc.com/persian/afghanistan-42634528>

27. *Govt Releases 75 Hizb-e-Islami Prisoners from Kabul Prison*, TOLO NEWS (Jan. 11, 2018), <https://www.tolonews.com/afghanistan/govt-releases-75-hizb-e-islami-prisoners-kabul-prison>.

28. The Afghan Criminal Procedure Act authorize the president to grant pardons or reduce punishments in 5 specific events, like Independence Day.

29. See 2014 *Criminal Procedure Act*, *supra* note 6, arts. 348, 354.

30. See QANUNI ASSASI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN], THE OFFICIAL GAZETTE OF AFGHANISTAN 818, 1383 [2004], art. 64 § 18; 2014 *Criminal Procedure Act*, *supra* note 6, art. 348.

31. See QANUNI ASSASI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN], THE OFFICIAL GAZETTE OF AFGHANISTAN 818, 1383 [2004], art. 64 § 18.

32. See 2014 *Criminal Procedure Act*, *supra* note 6, art. 348.

1. *The Pardon Power Under Afghanistan's Constitution*

Article 64 § 18 in the 2004 Afghanistan Constitution gave the President the power to “[r]educe and pardon penalties in accordance with the provisions of the law.”³³ The vague phrase, “provisions of the law” suggests Afghanistan needs to establish a framework to exercise the Article 64 §18 authority. There is still no current statute that specifically clarifies or legalizes the implementation of the pardon power. Without clear legal guidance, Afghanistan’s President used pardons to release or reduce the punishment of various prisoners through presidential pardon decrees, which are usually drafted by the ministry of justice.³⁴

From 2001 to 2004, Afghanistan’s judicial system used the Criminal Procedure Act of 1964.³⁵ Then, in 2004, the government enacted the Interim Criminal Procedure Act for Courts, using it simultaneously with the Criminal Procedure Act of 1964.³⁶ Both had loopholes and shortcomings because neither responded to the existing problems with the Presidential pardon power. Additionally, both laws did not have clear procedures restricting the President’s power or the manner of its exercise. As a result, the President broadly interpreted the Constitution’s Article 64 § 18, using it to implement his pardon power through presidential pardon decrees.

In 2014, the legislature made a few minor changes to the President’s pardon power with the ACPA.³⁷ One change slightly shortened the list of crimes that would make a criminal eligible for pardons or punishment reduction.³⁸ These changes will be further discussed below.

33. See QANUNI ASSASI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN], THE OFFICIAL GAZETTE OF AFGHANISTAN 818, 1383 [2004], art. 64 § 18.

34. Moqarara-e Tanzem Ejraat Wa Fahalit hai Wezart-e-Adlia [Regulation of the Procedure and Activities of the Ministry of Justice] 1420/1378 [1999] (Afg.), <http://moj.gov.af/fa/page/7943/9493>.

35. See QANUNI EJRAATI JAZAI MOHAQAT BARAI MAHAKEM [INTERIM CRIMINAL PROCEDURE CODE FOR COURTS] art. 98, THE OFFICIAL GAZETTE OF AFGHANISTAN 820, 1382 [2004] (Afg.).

36. See *id.*

37. See 2014 Criminal Procedure Act, *supra* note 6, arts. 348-354.

38. *Id.*

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2. *Pardon Power Under the Afghan Criminal Procedure Act*

ACPA's Article 348 confirms the President's pardon power through a pardon decree.³⁹ Although ACPA provides the President power through presidential decrees, it limits the power's scope.⁴⁰ For example, ACPA's Article 350 states the President can no longer issue a pardon for all crimes.⁴¹

However, ACPA is flawed, because it does not specify procedural mechanisms for the execution of presidential decrees.⁴² Article 348 states, "[a] pardon shall be carried out by the decree of the president and based on the decree some or all of the final punishments of the convicted person shall be dismissed or shall be reduced to a lighter punishment as anticipated by the law."⁴³ These deficiencies exist because the legislature lacked experienced drafting specialists, who are knowledgeable about drafting effective laws and the legal complexities of pardon decree legislation. Such legal complexities require laws to have specific implementation methods. Further, non-governmental organizations generally propose or draft laws, but such organizations also lack the institutional knowledge to draft laws that fit Afghanistan.⁴⁴

Notably, ACPA grants the President broad authority. Article 348 § 2 states, "[a] pardon shall not dismiss consequential and complementary punishments and security measures[,] and consequences of criminal charges[;] and does not affect previously applied punishments unless the issued pardon decree states otherwise."⁴⁵ The clause, "unless the issued pardon decree states otherwise," gives the President broad authority to pardon convicted criminals or commute sentences that have already been implemented.

The broad nature of the President's authority can enable corruption and political abuse. For instance, ACPA authorizes the President to

39. See 2014 Criminal Procedure Act, *supra* note 6, art. 348 (1).

40. *Id.* art. 350.

41. *Id.*

42. *Id.* art. 348 § 1.

43. *Id.*

44. Qudratullah Ahmadi, , *Negai Ba Hamalkard NGO ha Dar Afghanistan* [A Look at the Performance of NGOs in Afghanistan], THE DAILY AFG. MA (July 13, 2011), http://www.dailyafghanistan.com/opinion_detail.php?post_id=121657.

45. See 2014 Criminal Procedure Act, *supra* note 6, art. 348 (2).

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issue a pardon for “previously applied punishments.”⁴⁶ During the elections this power allows each presidential candidate to make various commitments to their followers by pardoning previous violations in exchange for votes.

Despite these flaws, the ACPA limits the President’s pardon power through the “preservation of [the] rights of others”⁴⁷ and the restrictions that prevent the President from pardoning specific crimes, like Hudud, Qesas, Deyyat,⁴⁸ intentional murder, kidnapping for ransom, administrative corruption, drug trafficking, recitivism, and other crimes determined by the President.⁴⁹ ACPA establishes some exceptions on the above restrictions and states the following:

Commuting the imprisonment punishment of [those convicted] of the crimes set forth in subparagraphs (1 and 2) of paragraph (2) . . . may be commuted if, in [the crime of] murder, the . . . victim[’s heirs] waive the convict’s punishment, and, in [the crime of] kidnapping, the property or benefit obtained is returned to the victim.⁵⁰

Moreover, under paragraph 4, the ACPA clarifies paragraph 2 and states, “[c]ommuting the punishment of convicts of the crimes set forth in paragraph (2) observing the provision of paragraph (3) of this Article shall not exceed $\frac{3}{4}$ of the punishment.”⁵¹

Although the ACPA allows for the pardon or reduction of punishment for convicted prisoners, it did not specify a method for the President to follow in issuing pardons.⁵² Similarly, the ACPA created another problem by allowing the President to pardon previously-sanctioned offenses.⁵³ The ACPA states the pardon decree cannot affect a past punishment unless otherwise decided by the presidential pardon decrees.⁵⁴

46. *Id.*

47. *Id.* art. 349.

48. *Id.* art. 350. The pardon of Deyyat is restricted unless the victim does not have an inheritor.

49. *See id.* art 350 §§ 1-2.

50. *Id.* art. 350 § 3.

51. *Id.* art. 350.

52. *Id.* art. 348.

53. *See id.* art. 348.

54. *See id.*

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This Article raises another issue about the difference between “pardon” and “restoring prestige” in the ACPA. Under ACPA’s article 352, when an individual requests expungement of his criminal record, the “primary court” that first convicted that individual has authority to issue an order restoring prestige.⁵⁵ In contrast, a pardon can dismiss or reduce “some or all of the final punishments of the convicted person,” which is entirely different from restoring prestige.⁵⁶ A pardon usually affects the current punishment, not the punishment that has already been implemented. By refusing to amend Article 350, the Afghan Government not only increases the President’s authority but also creates a conflict with ACPA’s Article 362.

Although the ACPA specifies the crimes for which the President can exercise his pardon power, it provides no mechanism or method for implementation. In practice, this lack of guidance leaves room for abuse of power. Further, while the President usually releases prisoners at an event expressly listed in the ACPA, the ACPA does not specify who should draft the pardon decree or what factors the drafters should consider. This part of the Article focuses on explaining the pardoning decree’s drafting process and the different occasions in which the President typically exercises this power.

Today, Afghanistan’s Ministry of Justice, in cooperation with the President’s office, typically drafts a pardon decree and sends it to the President for a final signature.⁵⁷ Each presidential pardon decree establishes a committee at the central and provincial levels of government to determine which prisoners are eligible for a pardon decree. Each committee usually consists of prosecutors, justice department representatives, members of the human rights office, police officers, and a civilian representative.⁵⁸

According to a pardon decree, the central committee is authorized to list eligible prisoners for reduced sentences or pardons.⁵⁹ Afterwards, the central committee sends the list to the President for

55. *See id.* art. 352.

56. *Id.* art. 348.

57. *See* Moqarara-e-Tanzem Ejraat, *supra* note 34.

58. Office of the President, *Pardon Decree*, OCS.GOV. AF, 1395 (Dec. 11, 2016), https://ocs.gov.af/dr/decrees_details/185 (last visited Mar. 3, 2018).

59. *Id.*

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approval.⁶⁰ If the President approves the list, the Attorney General has to implement the decree and send the implementation report to the President's office.⁶¹ According to the ACPA, the President can use his or her pardon power on certain occasions or at special events, as discussed below.⁶²

Under ACPA's Article 354, the Presidential should only grant pardon or punishment reduction decrees on special events.⁶³ The President may grant pardons in the following five events: (1) the Prophet Mohammad's birthday celebration; (2) Eid-e Ramazan; (3) Eid-e Qurban; (4) the victory of Afghan People's Jihad; and (5) the Afghanistan Independence Day.⁶⁴ These occasions have primarily been chosen based on religious guidance, rules, and national significance. According to the Holy Quran's provisions, Allah preferred pardon and forgiveness over revenge and punishment.⁶⁵ During the Rule of Law and Anti-Corruption Supreme Council's recent meeting, the Attorney General suggested an increase in the number of special events when the President can grant pardons.⁶⁶ The Attorney General wanted to increase the number of events to be consistent with international special occasions and have harmony with other countries.⁶⁷ He argued this decision would enable the President to grant pardons or forgiveness to foreign prisoners, and thus would allow the

60. Recently, the President authorized the Attorney General to approve the list of eligible prisoners who are convicted for less than five years imprisonment. Office of President, *The Decree of the President of the Islamic Republic of Afghanistan on the Rebate and Amnesty for the Prisoners and Prisoners on the Occasion of the Feast of Said al-Fitr*, OCS.GOV, AF (2018), https://ocs.gov.af/dr/decree_details/5.

61. See Office of the President, *Pardon Decree*, *supra* note 58.

62. See 2014 Criminal Procedure Act, *supra* note 6, art. 354.

63. *Id.* art. 354 §§ 1-5.

64. *Id.*

65. THE HOLY QURAN 2:178.

66. Recently, the Attorney General has suggested more event to grant pardon. Office of President, *The Session of the Justice and Judicial Committee of the Cabinet was Held*, OCS.GOV.AF (July 2018), <https://vpo.gov.af/-وکضاىى-جلسه-کمیته-عدلى-وکضاىى>.

67. *Id.*

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Afghan government to ask other countries to reciprocate for Afghan citizens.⁶⁸

The last paragraph of Article 354 also authorizes the president to grant pardons on other occasions based on his discretion.⁶⁹ These are called “special decree pardons.” This broad power provides the President with discretion to pardon anyone on any occasion. For example, on March 8, 2018, President Ghani granted a pardon decree under this authority, releasing at least sixty-eight prisoners in Kabul.⁷⁰ Another example occurred when Ghani entered into the peace agreement with HIA and committed to release all prisoners with HIA ties.⁷¹

C. Abuse of the Pardon Power

By allowing broad discretion over the issuance of pardons, Afghan law enables the President to abuse his authority—an outcome that likely occurs in a corrupt political climate. This section examines the dynamics of corruption and exposes how the President or other officials can abuse their power through the pardon procedure.

1. Political Corruption

In a country like Afghanistan where government organizations are weak or nonexistent, corruption has ample opportunity to undermine good governance, corrode official procedures, and interfere with government accountability. The judiciary system strongly feels this

68. Office of the President, *Jalse Shorai Hakemeyat Qanon Wan Mobareza Halee Fasad Adary Ba Reyasat Rahis Jomhor Ashraf Ghani Barguzar Shod* [The Supreme Council for the Rule of Law and Anti-Corruption was convened by President Ghani], OCS.GOV.AF (June 24, 2018), <https://president.gov.af/fa/news/628628>.

69. See 2014 Criminal Procedure Act, *supra* note 6, art. 354(6).

70. 68 *Tan Mahjozen, Mahboseen Zan Dar Zendan Honasia Pul-e Charkhi Kabul Wa Markaz-e Esla Wa Tarbia Atfal, Mawred Haf Wa Takhfif Qarar Greftand* [68 Convicted Women who were Detained in the Pul-e-Charkhi Prison of Kabul and Juveniles' Detention and Rehabilitation Center, Pardoned and Reduced Punishment], ATTORNEY GENERAL'S OFFICE (Mar. 8, 2018), <http://ago.gov.af/fa/news/437012>.

71. See 75 *Uzwe Hezb-e Islami*, *supra* note 26.

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corruption. As explained above, officials have consequently abused the pardon power and committed political corruption.⁷²

Corruption is often defined as the abuse of public power or authority.⁷³ In particular, political corruption is generally defined as the abuse of political power by government leaders or officials to maintain their power and authority.⁷⁴ Even though officials can use their power for other purposes, their abuse of power is not necessarily political corruption, because political corruption's main purpose is maintaining political power.⁷⁵

The legal and illegal actions of government officials in Afghanistan are difficult to differentiate, because Afghan laws provide officials with many broad or ill-defined powers. For instance, when the Afghan Government signed a peace agreement with the HIA in September 2016, the President made a commitment to release HIA prisoners through presidential pardon decrees.⁷⁶ These decrees were signed despite the procedural deficiencies in the existing pardon laws. Although the HIA peace agreement was intended to provide peace and security in Afghanistan, the President seemingly had the ulterior motive of gaining HIA support in next year's election. The President and the Afghan government's actions indicate they are trying to weaken political opponents and make themselves stronger. In several cases, President Ghani has dismissed, arrested, and imprisoned his political opponents, particularly government officials who did not support him.⁷⁷ For example, President Ghani dismissed Atta Mohammad Noor, the powerful governor from the Balkh province, because he was important

72. See generally *Sorat Jals-e Shomara 12 Sale 1396 Shorai Hali Hakemeyat Qanon Wa Mobareza Halia Fasad-e Adare* [Minutes of Meeting # 12 of Year 1396 of Supreme Council for the Rule of Law and Anti-Corruption] (Feb. 13, 2018), <http://www.aop.gov.af/wp-content/uploads/2018/04/Minutes-of-Meeting-12.pdf>.

73. Inge Amundsen, *Political Corruption: An introduction to the Issues*, 32, (CMI Working Paper WP 1999:7), <https://www.cmi.no/publications/1040-political-corruption>.

74. USLEGAL, *Political Corruption Law and Legal Definition*, <https://definitions.uslegal.com/p/political-corruption/> (last visited Apr. 12, 2018).

75. *Id.*

76. See generally *Full text of Peace Agreement with HIA*, *supra* note 25.

77. Eisa Khan Ayoobi, Ashraf Ghani: 'Philosopher King' or Ethnonationalist, AL JAZEERA (Feb. 6, 2018), <https://www.aljazeera.com/indepth/opinion/ashraf-ghani-philosopher-king-ethnonationalist-180201144845423.html>.

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in securing the region.⁷⁸ Moreover, Afghan Special Forces recently captured an Uzbek commander, Nezamuddin Qaisary, who fought alongside the government against the Taliban in the Faryab province, and then transferred him to Kabul.⁷⁹

The President has used this poorly-defined presidential pardon power in his favor to pardon individuals, despite Afghan laws being unclear on whether or how an individual can request a presidential pardon. However, in practice, the President has issued many individual pardons and released many criminals from prisons since 2004, under the current Constitution.⁸⁰ For example, former President Hamid Karzai granted individual pardons for three men who were convicted of gang-raping a woman in the Samangan province.⁸¹ The President granted these pardons because the three men allegedly had a great relationship with former President Karzai, one being a powerful local village commander.⁸²

2. Administrative Corruption

Aside from political and security problems, Afghanistan's government faces various challenges related to corruption and challenges that affect the process of creating a state. Afghanistan's government is dealing with threats to the "legitimacy" and stability of its sovereignty and rule of law.⁸³ This broad and ill-defined pardon power can cause not only political corruption but also administrative

78. *Id.*; see e.g. James Mackenzie, *Powerful Afghan Regional Leader Ousted As Political Picture Clouds*, REUTERS <https://mobile.reuters.com/article/amp/idUSKBN1EC2E1> (last visited Mar. 18, 2019).

79. *Afghan Special Forces Arrest 25 Armed Locals in Faryab Over Militia Dispute*, SALAAM TIMES (July 6, 2018), http://afghanistan.asia-news.com/en_GB/articles/cnmi_st/newsbriefs/2018/07/06/newsbrief.

80. See e.g. Kate Clark, *Afghan President Pardons Men Convicted of Bayonet Gang Rape*, INDEPENDENT (Aug. 24, 2008), <https://www.independent.co.uk/news/world/asia/afghan-president-pardons-men-convicted-of-bayonet-gang-rape-907663.html>.

81. *Id.*

82. *Id.*

83. Maíra Martini, *Overview of Corruption and Anti-Corruption in Afghanistan*, TRANSPARENCY INTERNATIONAL (Oct. 20, 2013), <https://knowledgehub.transparency.org/helpdesk/overview-of-corruption-and-anti-corruption-in-afghanistan>.

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3. *Problems with Broad Discretion*

One of the improvements in the new Afghan Penal Code is the introduction of grounds for rehabilitation of criminals.⁹¹ These provisions introduce alternatives to imprisonment,⁹² reduction of sentences,⁹³ and suspension of punishment.⁹⁴ These approaches are consistent with general judiciary and government policies, and international standards aimed at rehabilitative or restorative justice.⁹⁵ However, the improvements still provides for broad discretion, creating substantial room for officials to disregard the law and undermine the judiciary.⁹⁶ Judges are obligated to use their authority provided by the legislature to ensure the purposes of the punishment are satisfied.⁹⁷ They also should consider the family, cultural, social, and economic characteristics of the accused when they issue their verdict.⁹⁸ Judges could use tools, such as the quality of the sentence and the suspension of punishment, at the time the issuance verdict is issued. They could use also use other tools that are dedicated to the stage after the issuance of the ruling, such as conditional release.⁹⁹ Today, the penalty system has been adopted at a minimum and a maximum in various legal

91. These provisions entered into force on February 14, 2018.

92. CODE JAZA [PENAL CODE], art. 148, THE OFFICIAL GAZETTE OF AFGHANISTAN 1260, 1396 [2017] (Afg.).

93. *Id.* arts. 207-16.

94. *Id.* arts. 221-36.

95. ZAMEMA-E SHOMARA 2 QANON-E EJRAHAT JAZAEE DAR MOWREDE TATBEQ BADEL HAI HABS WA HAJZ [ANNEX (2) TO CRIMINAL PROCEDURE CODE ON IMPLEMENTATION OF ALTERNATIVE TO IMPRISONMENT AND DETENTION], art. 1 THE OFFICIAL GAZETTE OF AFGHANISTAN, EXTRAORDINARY ISSUE 1286, 1396 [2018] (Afg.). [hereinafter *Annex2 to ACPA*]

96. UNAMA *Welcomes Afghanistan's New Penal Code - Calls for Robust Framework to Protect Women Against Violence*, UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN (Feb. 22, 2018), <https://unama.unmissions.org/unama-welcomes-afghanistan%E2%80%99s-new-penal-code-calls-robust-framework-protect-women-against-violence>.

97. *See Annex2 to ACPA, supra* note 95, art. 8.

98. Zarorat Ahmal Takhfif Dar Rastai Habszedae/ Takhfif Dar Majazat Nabayad Sababe Tajre Mojrem Showad [The need to grant pardon or reduce punishment to release from imprisonment should not be caused extreme criminals], yjc.ir, (May 4, 2014), <https://www.yjc.ir/fa/news/4826043/>.

99. *Id.*

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systems.¹⁰⁰ Under this system, criminal judges are required to impose a penalty below the statutory limitation or make a proportionate penalty.¹⁰¹

Although deterrence is a goal of punishment, the Afghan government's *pardoning and reducing punishment policy*¹⁰² is a *releasing policy* that decreases the number of prisoners to reduce the cost of prisons.¹⁰³ This cost reduction can compensate for the injustices that have been committed by the weak and corrupt judicial system.¹⁰⁴ The Afghan Government seemingly adopts its releasing policy in consideration for the country's poor economy and corruption problems. For the Afghan government to effectively implement its releasing policy, it needs to create effective procedure and method.

Scholars who argue in favor of punishments aimed at *deterrence* note that it prevents not only an individual criminal, but also other criminals from committing crimes.¹⁰⁵ Therefore, the act of pardoning and forgiving punishments should not eliminate the judiciary's strength and the importance and intimidation of the law.

In many cases, a criminal's release through the pardon process has undermined the judiciary's strength and the law. The Sara case is one of the obvious examples. In 2007, former president Hamid Karzai, pardoned three men convicted of raping a woman in the Samangan.¹⁰⁶ The rape victim, Sara, knew the President pardoned her rapists, who were convicted and sentenced to imprisonment for eleven years.¹⁰⁷ Sara's husband, Dalawer, said, "[t]hese were men who had been sentenced and found guilty by the Supreme Court, [are] walking around freely."¹⁰⁸ A copy Hamid Karzai's pardon was issued in May, recommending release of all three men because "they had been forced

100. See *Annex2 to ACPA*, *supra* note 95, art. 8.

101. *Id.*

102. *Id.* art. 1.

103. See generally *The Purposes of Punishment*, UNIVERSITY OF MINNESOTA, <http://open.lib.umn.edu/criminallaw/chapter/1-5-the-purposes-of-punishment/> (last visited Mar. 18, 2019).

104. *Annex2 to ACPA*, *supra* note 95.

105. *The Purposes of Punishment*, *supra* note 103.

106. Kate Clark, *supra* note 80.

107. *Id.*

108. *Id.*

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to confess to their crimes.”¹⁰⁹ However, no evidence exists to prove that the three men had been forced to confess, and it is unlikely that someone can obtain a forced confession from powerful commanders in Afghanistan.¹¹⁰ This pardon shows how unbridled authority can cause problems and how authorized individuals can abuse power. Accordingly, Lord Acton, a British politician in the nineteenth century said, “[a]bsolute power corrupts absolutely.”¹¹¹

Therefore, the combined lack of a database on offenders, accurate information, and definite procedures for pardons and punishment reduction, along with weak government institutions have led to corruption. Through this corrupt pardon process, many perpetrators are released from prison every year without a careful examination of the perpetrator's records and status. This corrupt process threatens to undermine the role of the judiciary and the rule of law.

D. Lack of Meaningful Separation of Powers

The 2004 Afghan Constitution, still in effect today, established the Afghan government as a centralized presidential system with powers separated into three branches: executive, legislative, and judicial.¹¹² The National Unity Government (“NUG”) was created to maintain peace and stability after neither of the major candidates, Dr. Ashraf Ghani and Dr. Abdullah Abdullah, would concede defeat in the controversial 2014 election.¹¹³

The NUG is a power-sharing agreement under which both parties play a role.¹¹⁴ Under this agreement, the executive branch was divided

109. *Id.*

110. *Id.*

111. *Lord Acton Quote Archive*, ACTON INSTITUTE, <https://acton.org/research/lord-acton-quote-archive> (last visited Feb. 27, 2019).

112. *See* QANUNI ASSASI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN], THE OFFICIAL GAZETTE OF AFGHANISTAN 818, 1383 [2004], Ch. 3, art 6.

113. Barnett R. Rubin & Georgette Gagnon, *The U.S. Presence and Afghanistan's National Unity Government: Preserving and Broadening the Political Settlement*, CTR ON INT. COOPERATION (Aug. 2016), https://cic.nyu.edu/sites/default/files/national_unity_government_final.pdf.

114. *Agreement Between the Two Campaign Teams Regarding the Structure of the National Unity Government*, L.A. TIMES (Sept. 21, 2014),

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into two parts: (1) the President, Dr. Ghani, as Commander-in-Chief and head of all three branches, and (2) the Chief Executive Officer (CEO), Dr. Abdullah, as the head of the Council of Ministers.¹¹⁵ The NUG does not affect the President's pardon power, because he remains the only person with that power under Article 64 of the Afghan Constitution.¹¹⁶ The President has this sole power under both structures—the structure established under the Constitution and the NUG.

1. *Executive Power*

Despite the separation of powers, the executive branch is much more powerful than the other two branches. The President wields overruling power over the two other branches, notably over Parliament, because executive officials who are impeached by Parliament can remain in their positions for several months or years, based on the President's order.¹¹⁷ For example, in 2016, the Afghan Parliament dismissed seven ministers¹¹⁸ with no confidence votes, President Ghani

<http://documents.latimes.com/agreement-between-two-campaign-teams-regardingstructure-national-unity-government/>.

115. *Id.*

116. *See* QANUNI ASSASI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN], THE OFFICIAL GAZETTE OF AFGHANISTAN 818, 1383 [2004], art. 64.

117. Kevin Sieff, *Karzai Approves Impeachment of Two Key Afghan Ministers*, WASHINGTON POST (Aug. 5, 2012), https://www.washingtonpost.com/world/asia_pacific/karzai-approves-impeachment-of-two-key-afghan-ministers/2012/08/05/42db29c8-df00-11e1-a19c-fcfa365396c8_story.html?utm_term=.fd0ddc5fa9c6.

118. The seven ministers are the following individuals: Salahuddin Rabbani, the Minister of Foreign affairs; Mahmud Balegh, the Minister of Public Works; Nasrin Oryakhel, the Minister of Labour, Social Affairs, Martyrs and Disabled; Assadullah Hanif Balkhi, the Minister of Education; Mohammadullah Batash, the Minister of Transport and Civil Aviation; Farida Momand, the Minister of Higher Education; and Abdul Razeq Wahidi, the Minister of Telecommunication. Thomas Ruttig, *Parliament Kicks Out Ministers Again: A Multi-Dimensional Power Struggle*, AFGHANISTAN ANALYSTS NETWORK (Nov. 19, 2016), <https://www.afghanistan-analysts.org/parliament-kicks-out-ministers-again-a-multi-dimensional-power-struggle/>.

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ordered “the dismissed ministers to remain in office, and asked the Supreme Court to reverse the parliament’s decision.”¹¹⁹

The President’s order allowed Salahuddin Rabbani, the dismissed Minister of Foreign affairs, to remain in his post despite his formal vote of no confidence.¹²⁰ Although the other six ministers have since left their offices, the Supreme Court has not yet ruled on whether Parliament’s impeachments were constitutional.¹²¹ Parliament argued that Article 121 of the Afghan Constitution merely grants the Supreme Court the authority “to review the constitutionality of laws.”¹²² Further, Parliament argued Article 121 does not authorize the Court to decide on the constitutionality of the Parliament’s appointment and removal powers.”¹²³ As it seems, the Supreme Court, in considering the current political situation, “has decided not to decide,” on this sensitive issue.¹²⁴

2. Legislative Power: Parliament

Afghanistan’s Parliament consists of two houses: (1) the Wolesi Jirga (“House of Representatives”) and (2) the *Meshrano Jirga* (“House of Elders”).¹²⁵ According to Afghanistan’s Constitution, a House of Representatives member shall be elected for a five-year term through a

119. Shamshad Pasarlay, *When Courts Decide Not to Decide: Understanding the Afghan Supreme Court’s Struggle to Decide the Fate of the Dismissed Ministers*, ICONNECT BLOG (Mar. 22, 2017), <http://www.icconnectblog.com/2017/03/when-courts-decide-not-to-decide-understanding-the-afghan-supreme-courts-struggle-to-decide-the-fate-of-the-dismissed-ministers/>.

120. See, e.g., Catherine Putz, *Power Struggle Continues Inside Afghan Government*, THE DIPLOMAT, (Nov. 29, 2016), <https://thediplomat.com/2016/11/power-struggle-continues-inside-afghan-government/>; Massoud Ansar, *Ghani Accused of Violating Constitution, Disregarding Parliament*, TOLO NEWS (Sept. 25, 2017), <https://www.tolonews.com/afghanistan/ghani-accused-violating-constitution-disregarding-parliament>; Thomas Ruttig, *Parliament Kicks Out Ministers Again: A Multi-Dimensional Power Struggle*, AFGHANISTAN ANALYSTS NETWORK (Nov. 19, 2016), <https://www.afghanistan-analysts.org/parliament-kicks-out-ministers-again-a-multi-dimensional-power-struggle/>.

121. Pasarlay, *supra* note 119.

122. *Id.*

123. *Id.*

124. *Id.*

125. See QANUNI ASSASI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN], THE OFFICIAL GAZETTE OF AFGHANISTAN 818, 1383 [2004], art. 82.

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direct, transparent, and fair election.¹²⁶ Each province votes for a representative, and the seats are allocated in proportion to a provinces' population.¹²⁷

However, the House of Elders' composition is different, because the President selects one-third of its members for a five-year term.¹²⁸ The other two-thirds are elected through provincial councils for a four-year term and district councils for a three-year term.¹²⁹ Both houses have oversight powers over the executive branch by adopting laws.¹³⁰ The House of Representatives can also confirm the President's appointment of government ministers and heads of independent offices.¹³¹ Although both Houses do not have a direct role or check on the President's pardon power, they can indirectly limit this power by adopting laws under Article 90 §1 of the Afghan Constitution.¹³²

3. *The Judicial Power and the Role of the Supreme Court*

Under Afghanistan's Constitution, the Supreme Court consists of nine judges appointed by the President and confirmed by Parliament.¹³³ Due to the nature of judicial appointments, the executive and legislative branch appear capable of influencing judiciary decisions. For example, the President has used judicial review, one of the Supreme Court's important powers, against Parliament.¹³⁴ Under Afghanistan's Constitution, the Supreme Court has the authority to interpret the law at the request of the President or lower courts.¹³⁵ This gives the President substantial power over judiciary decisions because the

126. *Id.* art. 83.

127. *Id.*

128. *Id.*

129. *Id.* art. 84.

130. *Id.* art. 90.

131. QANUNI ASSASI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN], THE OFFICIAL GAZETTE OF AFGHANISTAN 818, 1383 [2004], art. 91.

132. *Id.*

133. *Id.* art. 117.

134. Ghizaal Haress, *Judicial Review in Afghanistan: A Flawed Practice*, UNITED STATES INSTITUTE OF PEACE (Aug. 2017), <https://areu.org.af/wp-content/uploads/2017/08/1722E-Judicial-Review-PN-1.pdf>.

135. QANUNI ASSASI AFGHANISTAN [THE CONSTITUTION OF AFGHANISTAN], THE OFFICIAL GAZETTE OF AFGHANISTAN 818, 1383 [2004], art. 121.

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President can simply request that the Supreme Court review laws that do not benefit the President's interests. Historically, the Supreme Court has often interpreted the law in the President's favor.¹³⁶ For instance, when Parliament adopted the "Law on Issuance of Legislative Decree,"¹³⁷ the President vetoed it and sent it back to Parliament.¹³⁸ When Parliament ratified the law again with a two-thirds majority, the President requested that the Supreme Court review the law's constitutionality.¹³⁹ The Supreme Court revoked the Law on Issuance of Legislative Decree and emphasized the Executive Branch's position.¹⁴⁰ In this case, the Supreme Court of Afghanistan did not decide independently, showing its inability to limit the President's powers, including the pardon power.

II. SEEKING IDEAS FOR REFORM: PARDON POWERS IN IRAN AND WASHINGTON STATE

A. *The Iranian Model*

Historically, communities generally respond to crime with punishment. Alongside punishment have been pardons, which have existed since ancient times.¹⁴¹ Those who committed crimes were sometimes pardoned in cases that considered specific conditions.¹⁴² Today, the pardon institution continues to maintain its status despite the

136. See generally QANUNI SODOR FARAMINE TAQININE [LAW ON ISSUANCE OF LEGISLATIVE DECREE], arts. 10-16, THE OFFICIAL GAZETTE OF AFGHANISTAN 1285, 1396 [2018] (Afg.).

137. *Id.* at 1340-42.

138. *Id.* at 1396.

139. *Id.*

140. *Id.* at 1406-1412.

141. See Dr. Ali Safari & Behnaz Rezai, *Tahlile Bar Hainnama Kamison Haf Wa Takhfif Majazat Makomen Musaweb 12/9/1387 Dar Muqahisa Ba Hainnama Kamison Haf wa Takhfif wa Tabdel Mojazat Musaweg 16/5/1387* [An Analysis of Regulation of the Pardoning and Reducing the Punishment of Convicts Adopted in 12/9/1387 Compared with the Regulation of the Pardoning, Reducing and Changing the Punishment of Convicts adopted in 16/5/1387], 2 (2015), <http://lawmagazine.sbu.ac.ir/index.php/researchejuridique/article/view/978/978>. [hereinafter *Analysis of Pardoning Regulation*].

142. *Id.*

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existence of practices, such as: conditional release, different types of punishment suspension, and alternative imprisonment and detention.¹⁴³

Iran's pardon laws are a model for reform because its laws have been successful. Further, as an Islamic republic, Iran shares many characteristics with Afghanistan's system, particularly from a social-political standpoint. Both countries follow a combination of civil and Islamic law.¹⁴⁴ Like Afghanistan, Iran is a multicultural country with many linguistic and ethnic groups.¹⁴⁵ According to the World Factbook, 99.4% of Iran's population are Muslim and the majority of them are Shi'a.¹⁴⁶ Also, like Afghanistan, Iran's official language is Farsi.¹⁴⁷

Iran has a unique pardon system because the pardon power is vested in the Revelation Leader rather than the President or other executive authorities.¹⁴⁸ Iran's system sets a good example for Afghanistan because, like in Afghanistan, Iran's legislation derives from Islamic law and the Roman-German legal system.¹⁴⁹ In light of its current legal and political structure, Iran pursues a specific policy of pardoning or reducing punishment.¹⁵⁰ Meanwhile, Iran is also committed to combatting corruption and has safeguards to prevent abuses of the pardon power.¹⁵¹ Further, a study of Iran could be useful for Afghanistan because Iran has at least seventy-three years of legislative experience in pardon law or regulation.¹⁵²

143. *Id.*

144. Parviz Owsia, *Sources of Law under English, French, Islamic and Iranian Law: A Comparative Review of Legal Techniques*, 6 ARAB LAW QUARTERLY 33, 37 (1991); Abdul Satar Sirat, *The Modern Legal System of Afghanistan*, 16-4 THE AMERICAN JOURNAL OF COMPARATIVE LAW 563, 569 (1968); ERYAND ABRAHAMIAN, *HISTORY OF MODERN IRAN* 177 (Cambridge University Press (2008)).

145. *Iran*, CIA FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html> (last visited Apr. 9, 2018).

146. *Id.* Shi'a is one of the main schools of Islam.

147. *Id.*

148. QANUNI ASSASSI JUMHURI ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] July 28, 1989, art. 110 § 11, 1368 (Ir.).

149. Parviz Owsia, *supra* note 144, at 67.

150. *Analysis of Pardoning Regulation*, *supra* note 141.

151. *Id.*

152. *Id.*

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Before 1979, the Iranian system was secular.¹⁵³ After the 1979 revolution, Islam became Iran's official religion.¹⁵⁴ The 1979 revolution overthrew the Pahlavi Dynasty's constitutional monarchy in Iran and replaced it with the Islamic Republic.¹⁵⁵ Then, Iran adopted a constitution in 1979 that outlined its new system of governance; it was later revised in 1989.¹⁵⁶ Iran's 1989 Constitution created a combination of parliamentary democracy and Islamic theocracy with Islamic jurists holding a religious role under the Supreme Leadership Concept.¹⁵⁷

As the highest official authority, the Supreme Leader is accountable to the Assembly of Experts and exercises his authority under Article 110 of Iran's Constitution.¹⁵⁸ The Supreme Leader is also the Commander-in-Chief and has control over armed forces, foreign and domestic policies.¹⁵⁹ He also appoints or dismisses the Chief of Justice, the head of the national radio and television, and the Commander of the Islamic Revolutionary Guard Corps.¹⁶⁰ Additionally, he authorizes and appoints six of the twelve members in the Council of Guardians.¹⁶¹

Under the new Constitution, Iran's president holds the second-highest official position.¹⁶² Iran's president is elected for a term of four

153. *The Structure of Power in Iran: An Overview of the Iranian Government and Political System*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/tehran/inside/govt.html> (last visited May 27, 2018).

154. Greg Bruno, *Religion and Politics in Iran*, COUNCIL ON FOREIGN RELATIONS (June 19, 2018), <https://www.cfr.org/backgrounder/religion-and-politics-iran>.

155. *Iran*, CIA FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html> (last visited Apr. 9, 2018).

156. QANUNI ASSASSI JUMHURI ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] Dec. 3, 1979, art. 110 § 6, 1358 (Ir.).

157. *See generally* QANUNI ASSASSI JUMHURI ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] July 28, 1989, [1368] (Ir.).

158. QANUNI ASSASSI JUMHURI ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] (July 28, 1989), art. 110, 1368 (Ir.).

159. *Id.*

160. *Id.*

161. The Council of Guardians is a powerful body that has the authority to oversee the activities of Parliament and determines which candidates are qualified to run for public office. QANUNI ASSASSI JUMHURI ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] (July 28, 1989), art. 110 § 6(a), art. 91 § 1, 1368 (Ir.).

162. *Id.* art. 113.

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years and can serve for two terms.¹⁶³ He also heads the executive branch and inspires the implementation of the Constitution and economic policies.¹⁶⁴ Iran's president is accountable to the Iranian people, the Supreme Leader, and the Islamic Council.¹⁶⁵

Iran's Constitution establishes a Parliament consisting of 290 members who legislate and oversee the executive branch's activities.¹⁶⁶ Iran's Parliament members serve four-year terms with the power to pass laws and impeach ministers and the president.¹⁶⁷ All bills passed by Iran's Parliament are then reviewed by the Guardian Council.¹⁶⁸

The "Guardian Council," or Shorai Negaban, consists of twelve members.¹⁶⁹ Half of its members are theologians selected by the Supreme Leader; the remaining members are nominated by the Chief Justice and approved by parliament.¹⁷⁰ Guardian Council members are elected for six-year terms and are responsible for reviewing all bills passed by Iran's Parliament.¹⁷¹ Guardian Council members may also "bar candidates from standing in elections for parliament, the presidency and the Assembly of Experts."¹⁷²

The judiciary is another important branch of the Iranian government. The Supreme Leader appoints the Chief of Justice, or Head of Judiciary, to oversee the implementation and enforcement of Islamic laws and define legal policy.¹⁷³

163. *Id.* art. 114.

164. *Id.* art. 113, 114.

165. *Id.* art. 122.

166. *Id.* art. 64.

167. QANUNI ASSASSI JUMHURI ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] (July 28, 1989), arts. 63, 71, 89, 1368 (Ir.).

168. *Id.* art. 94.

169. *Id.* art 91.

170. *Id.*

171. *Id.* art. 92

172. *Guide: How Iran is Ruled*, BBC NEWS (June 9, 2009), http://news.bbc.co.uk/2/hi/middle_east/8051750.stm.

173. *Id.*; QANUNI ASSASSI JUMHURI ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] (July 28, 1989), art. 110 §6(b), 1368 (Ir.).

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Majlese Khebragan, or the Assembly of Experts, are authorized to appoint or dismiss the Supreme Leader.¹⁷⁴ These clerics are elected for eight-year terms and can nominate themselves.¹⁷⁵ The current assembly has eighty-six members and holds two sessions each year.¹⁷⁶

1. *History of Iran's Pardon Power*

Because the Quran recommends pardons, Iran's Islamic government considers pardons an important institution.¹⁷⁷ Iran has seriously applied the pardon institution in its criminal policy in accordance with religious recommendations, historical references, and social-political situations.¹⁷⁸

The pardon may be one of the oldest institutions in Iranian criminal law, which reportedly began during the time of Cyrus the Great.¹⁷⁹ Based on ancient Iranian books, Cyrus announced an amnesty after capturing Babylonia.¹⁸⁰ The pardon has remained prominent in modern and contemporary Iranian criminal law since before the Islamic Revolution, dating back to the 1925 Penal Code.¹⁸¹

Before the Islamic Revolution, Iran had the "Pardoning and Forgiveness Commission Regulations."¹⁸² On October 20, 1945, the Ministry of Justice approved these regulations through eight articles.¹⁸³ The regulation did not design ordinary meetings for the Pardoning and Forgiveness Commission, but the General Penal Code requires the

174. QANUNI ENTEKHABAT WA HAIN NAMA-E DAKHILI MAJLESE KHEBRAGAN [THE ELECTION ACT AND INTERNAL REGULATION OF THE ASSEMBLY OF EXPERTS], art. 4, 1359 [1980] (Ir.).

175. *Id.*

176. *Guide: How Iran is ruled*, *supra* note 172.

177. THE HOLY QURAN, 2:178.

178. *Analysis of Pardoning Regulation*, *supra* note 141.

179. *Id.*

180. R.J. VAN DER SPEK, *Cyrus the Great, Exiles and Foreign Gods A Comparison of Assyrian and Persian Policies on Subject Nations*, in *Extraction & Control* 1, 1 (Michael Kozuh et al. eds, 2014).

181. *Analysis of Pardoning Regulation*, *supra* note 141, at 5.

182. *Id.*

183. *Id.*

commission to be held at the Office of Legal Affairs of the Ministry of Justice every four months.¹⁸⁴

On September 19, 1964, the Minister of Justice adopted another regulation entitled “Regulations of the Pardoning and Forgiveness Commission.”¹⁸⁵ Set in eighteen articles, this new regulation required the Pardoning and Forgiveness Commission to convene four meetings every year, under the authority of the Chief of the Office of the Justice.¹⁸⁶ This regulation was amended on July 14, 1975, and was enforced with thirteen articles until Iran’s Islamic Revolution.¹⁸⁷

After the Islamic Revolution, Article 110 of the 1979 Iranian Constitution governed the Supreme Leader’s duties and authority.¹⁸⁸ This article authorized the Supreme Leader to issue pardons or reduce punishment through the Chief Justice’s recommendations and “within the framework of Islamic criteria.”¹⁸⁹ When Iran amended its Constitution in 1989, it continued to vest the Supreme Leader with power to “pardon[] or reduc[e] the sentences of convicts . . . after the head of the judiciary power has recommended such a motion.”¹⁹⁰

Iran’s Constitution ultimately gave the Supreme Leader pardon power rather than its president.¹⁹¹ Article 110 § 11 of Iran’s Constitution authorized the Supreme Leader to reduce or pardon convicted prisoners according to the Chief Justice’s request.¹⁹² Iran recognized this pardon power by adopting the Penal Code, the Criminal Procedure Codes, and the Regulation of the Pardoning and Reducing the Punishment of Convicts.¹⁹³ Article 96 of the Iranian Islamic Criminal Code mirrors the language of the Constitution by stating,

184. *Id.* Article 55 of the General Penal Code provides that the Pardoning and Forgiveness Commission must be held at the Office of Legal Affairs of the Ministry of Justice every four months.

185. *Id.* at 4.

186. *Id.* at 5.

187. *Id.*

188. QANUNI ASSASSI JUMHURI ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] Dec. 3, 1979, art. 110, 1358 (Ir.).

189. *Id.* art. 110 § 6

190. QANUNI ASSASSI JUMHURI ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] (July 28, 1989), art. 110 § 11, 1368 (Ir.).

191. *Id.*

192. *Id.*

193. *Analysis of Pardoning Regulation*, *supra* note 141.

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“[p]ardon or mitigation of punishment of the convict, in accordance with Islamic principles, is upon the proposal of the Head of Judiciary and approval of the Leader.”¹⁹⁴ Thus, Iran's Supreme Leader has pardon power in Iran.

After 1979, the legislature emphasized the sources of Islamic law in upholding the pardon institution.¹⁹⁵ Consequently, on May 11, 1980, the Supervisory Board of Ministry of Justice approved the first “Pardoning and Forgiveness Regulation” in fourteen articles.¹⁹⁶ However, this regulation was abolished after nine months, when the Supreme Judicial Council approved a new regulation based on Article 110 section 6 of the 1979 Constitution.¹⁹⁷ The Pardoning Regulation has since been amended five times.¹⁹⁸ In December 2008, the Head of the Judiciary adopted the current “Pardoning and Forgiveness Regulation” and made a Central Commission, combining five judges with a provincial commission from each province to review pardon requests.¹⁹⁹

2. *Iran's Mechanisms and Methods for Pardons or Punishment Reductions*

This section will illustrate Iran's current mechanisms and methods for issuing pardons at the central and provincial level. This section will also discuss the Central and Provincial Commissions' structure, and how other organizations and administrations play a role in certain aspects of pardon procedures. This discussion will identify how Afghanistan should use Iran's approach to prevent the abuse of discretion and corruption that is infecting Afghanistan's system.

Article 1 of Iran's current Regulation of the Pardoning and Reducing Punishment of the Convicts forms the Pardoning and Reducing Punishment Commissions in the Central and Provincial level.²⁰⁰ These Commissions were designed to implement the authority

194. QANUNI MAJAZATE ISLAMI [THE ISLAMIC PENAL CODE], art. 96, 1392 (Ir.).

195. *Analysis of Pardoning Regulation*, *supra* note 141, at 6.

196. *Id.*

197. *Id.* at 7.

198. *Id.*

199. *2008 Iranian Pardoning Regulation*, *supra* note 9, art. 2,3.

200. *Id.* art. 1.

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provided in Article 110 paragraph 11 of the Iranian Constitution.²⁰¹ The Central Commission is composed of five judges who should be familiar with Islamic and ordinary law and have ten years judicial experience.²⁰² Under this regulation, the Chief of Justice is authorized to appoint the Central Commission members for five years and select one member as head of the commission.²⁰³ Although the member selection process lacks democratic characteristics, the Central Commission's existence is considered a positive factor. The Central Commission requires its meetings to maintain a quorum of at least three members, and its decisions are validated with three votes.²⁰⁴

Provincial Commissions are also formed based on the Iran's current Regulation of the Pardoning and Reducing Punishment of the Convicts.²⁰⁵ Provincial Commissions can hold their meetings and make decisions with the presence of three members and a majority vote.²⁰⁶ A Provincial Commission consists of the General Head of the Provincial Justice Department, a judiciary representative from the respective province, the provincial prosecutor, and the Director General of the province's prisons.²⁰⁷ Under this regulation, the following individuals can request a pardon: the Head of the Justice Department, the prosecutors, the judge of the prison observer, the prison chief, the convicted person, and the convicted person's family.²⁰⁸ If either the Central Commission or the Provincial Commission find the pardon or punishment reduction request eligible, the Central Commission may refer the request to the Supreme Court.²⁰⁹ Once the Chief Justice ratifies the pardon request, it is presented to the Supreme Leader for a final decision.²¹⁰

During a formal meeting and evidence assessment, the Provincial Commission determines whether an application for pardon or sentence

201. *Id.*

202. *Id.* art. 2.

203. *Id.* art. 2, 3.

204. *2008 Iranian Pardoning Regulation, supra* note 9, art. 3.

205. *Id.* art. 4

206. *Id.*

207. *Id.*

208. *Id.* art. 6.

209. *Id.* art. 15.

210. *2008 Iranian Pardoning Regulation, supra* note 9, art. 15.

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reduction is eligible.²¹¹ If the application is eligible, the Provincial Commission will send the Secretariat of the Central Commission its reasons for accepting the application and a recommendation in a full status report.²¹² If the Provincial Commission finds a pardon or reduction request ineligible, it will archive the request unless the Chief Justice of Iran refers the request to the Central Commission for consideration and final determination.²¹³ The Chief Justice's ability to interfere with requests shows how the Provincial Commissions do not have the final authority to determine a pardon request. The Chief Justice and the Central Commission can always decide to re-examine pardon or reduction requests, which reduces the Provincial Commissions' significance and undermines their independence.

Iran's pardon process shows its commitment to efficiency. Iran's current pardon regulation made the Information Office, Counter Narcotics Department, and other relevant departments responsible for answering all official requests from the Central and Provincial Commissions.²¹⁴ Both the Central and Provincial Commissions conduct meetings every fifteen days and anticipate fourteen occasions for implementing the pardon and reducing punishment in the Pardon Regulation.²¹⁵ This frequency and efficiency shows the Iranian government's serious and decisive commitment to release the prisoners.²¹⁶

If the Provincial Commission reviews and finds pardon requests eligible, it will make a list and send their decision to the Central Commission one month before the deadline.²¹⁷ These decisions come with the Provincial Commission's recommendations and explanations for an applicant's eligibility for pardon or punishment reduction.²¹⁸ The Provincial Commission cannot send its decisions directly to the

211. *Id.* art. 8.

212. *Id.* The full status report provides information on the status of convicts in the province.

213. *Id.*

214. *Id.* arts. 7, 10, 22.

215. *Id.* art. 15.

216. *2008 Iranian Pardoning Regulation, supra* note 9, art. 15.

217. *See id.*

218. *Id.*

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Supreme Court.²¹⁹ This means the Central Commission reviews all lists provided by Provincial Commissions throughout Iran. Then, the Central Commission sends the eligible pardon or punishment reduction lists to the Supreme Court, which forwards all the lists to the Supreme Leader for ratification.²²⁰

The Central Commission also makes two lists noting the following: (1) prisoners who are eligible for pardons, and (2) prisoners who are eligible for punishment reduction.²²¹ Pardoned prisoners are released as soon as possible, and a releasing report is sent back to the Central Commission, ten days after the pardon issued.²²² This shows efficiency in Iran's process. Further, if pardons for convicted persons lack conditions, the Chief of Justice can offer the convicted person a pardon concurrently by mentioning preferred causes or justifiable reasons, which also undermines the Central and Provincial Commissions' independency and role.²²³

3. *Lessons from the Iranian Approach*

The Iranian approach shows a pardon should not undermine judicial authority, and that an effective and qualified body should carefully examine a pardon request to ensure unrehabilitated persons are not released from prison.²²⁴ Although Afghanistan's Constitution gives the President pardon power, its lack of procedure undermines the judiciary system's role and fosters corruption. By considering Iran's model, Afghanistan can adopt a pardon institution to stop corruption and the abuse of power, and implement laws that ensure respect for judicial decisions and the rule of law.

Iran's approach is also an effective model because it allows prisoners and their relatives to request pardons through specified procedures.²²⁵ Unfortunately, Afghanistan's laws do not provide a specific right to seek pardon and they do not explicitly explain how a

219. *Id.*

220. *Id.*

221. *Id.* art. 16.

222. *Id.* art. 17.

223. *Id.* art. 20.

224. *Id.* art. 24 § 10.

225. 2008 Iranian Pardoning Regulation, *supra* note 9, art. 1.

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person petitions for a pardon. By establishing an official mechanism for pardon requests, Iran's approach reduces the need for unofficial dealings and requests, which could be corrupted by bribes and favors. Therefore, Afghanistan should recognize the fundamental right to request pardons by adopting a regulation or amending the ACPA. Afghanistan could even amend its Constitution to recognize pardon petition rights and limit the President's pardon power.

However, Iran's regulation on pardon power does have some weaknesses. While having authority to appoint Commission members, the Chief Justice also has the power to recommend pardons to the Supreme Leader.²²⁶ The Chief Justice can make these recommendations even if the petition does not meet the circumstances provided in the regulation.²²⁷ This Iranian approach may undermine the commissions' independence. Moreover, the Provincial Commissions' decisions may be overturned by the Central Commission, which undermines the Provincial Commissions' authority and independence.

B. The Washington State Model

Although Washington State's laws and society vastly differ from Afghanistan, aspects of Washington's pardon law could be a helpful model for Afghanistan. Despite the socio-political differences, Washington State offers Afghanistan some sound practices and model rules. Washington State provides detailed directions for its pardoner and specifies clear legal methods for carrying out pardons or reducing punishments. These processes can be adapted to Afghanistan's conditions and legal system.

1. Brief History of Pardon Power in the U.S.

Although the pardon power is an ancient principle, the logic and rationale behind this practice remains a controversial issue among scholars.²²⁸ All legal practices are created in communities for specific

226. *Id.* art. 2, 15

227. *Id.* art. 20.

228. Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651, 1653 (2008), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1287&context=ilj>.

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purposes and are justified through logic and reason. The pardon power is also a practice that has been created based on society's needs. The pardon power was incorporated into the United States Constitution by following England's common law.²²⁹ When the United States Constitution was ratified, the pardon power was one of the United States President's "least limited" powers.²³⁰ Although many people questioned the practice of presidential pardons, its supporters highlighted the rationale behind its existence.²³¹ Alexander Hamilton emphasized the need for pardons in his Article No 74.²³²

Although this article does not intend to discuss the rationale behind the pardon power, this issue must be discussed in order to understand the value of the pardon practice in the United States.²³³ The logic and rationale behind each practice can vary among societies, but the pardon power generally fulfills four useful functions: (1) to reverse wrongful convictions; (2) to eliminate punishments that are not commensurate with the crime committed; (3) to "restore national unity, either by ending a conflict or by forgiving the losers,"²³⁴ and (4) to use the power as a political and "foreign policy tool to satisfy foreign leaders."²³⁵

2. *Pardons Under the Washington State Constitution, the Revised Code of Washington State, and Clemency Bylaws of the Clemency and Pardoning Board*

Following the United States Constitution, various American States vest pardon authority or competence in their governors. In 1878, when the territory of Washington was trying to achieve statehood in the

229. Brian C. Kalt, *Pardon Me: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 782 (1996-1997).

230. See William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 523 (1977), <http://scholarship.law.wm.edu/wmlr/vol18/iss3/3>.

231. Alexander Hamilton, *The Federalist Papers: No. 74: The Command of the Military and Naval Forces, and the Pardoning Power of the Executive From the New York Packet* (Mar. 25, 1788), THE AVALON PROJECT—LILLIAN GOLDMAN LAW LIBRARY, YALE LAW SCHOOL, http://avalon.law.yale.edu/18th_century/fed74.asp.

232. *Id.*

233. Fowler, *supra* note 228.

234. *Id.* at 1653-54.

235. *Id.*

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United States,²³⁶ a convention tried to ratify a proposed constitution.²³⁷ However, after failing to get the United States Congress's endorsement, the Washington territory could not ratify its constitution and get state recognition.²³⁸ Although the attempt was unsuccessful, the proposal took the pardon power into consideration.²³⁹

In 1889, Washington drafted another Constitution, which was a comparative study of various State constitutions.²⁴⁰ This draft was sent to Congress for ratification and State recognition.²⁴¹ Through the Washington Constitution's ratification, Washington became the 42nd State of America.²⁴² Washington State's Constitution vested pardon power in its State Governor under article three section nine. This article section is identical to the provisions in Washington State's draft Constitution of 1878²⁴³ and the Hill Constitution.²⁴⁴

While Washington's 1889 Constitution was being drafted, two opposing views disputed the placement of pardon power.²⁴⁵ One view wanted to give pardon power to a Governor's Council, which would work along with the Governor.²⁴⁶ Others disagreed with this position and argued that the constitution "already permitted the legislature to experiment and this prerogative would be eliminated under the amendment."²⁴⁷ Two representatives, George Turner and Allen Weir, emphasized that "the pardoning power should be placed in a single

236. The territory of Washington was not recognized as a state of the United States in 1878.

237. Elizabeth Gibson, *First Washington Constitutional Convention convenes in Walla Walla on June 11, 1878.*, HISTORY LINK (Mar. 7, 2006), <http://historylink.org/File/7648>.

238. *Id.*

239. *Id.*

240. Arthur S. Beardsley, *Sources of the Washington State Constitution, Preface to THE STATE OF WASHINGTON, 2011-2012, LEGISLATIVE MANUAL 402*, <https://lib.law.uw.edu/waconst/sources/LegManBeardsley.pdf>

241. *Id.*

242. *Id.*

243. WASH. CONST. 1878, Art. VIII, Sec. 5.

244. Beardsley *supra* note 240, Hill, Art. V, Sec 9.

245. QUENTIN SHIPLEY SMITH, *THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889*, 569 (Beverly Paulik Rosenow ed., 1999).

246. *Id.*

247. *Id.*

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person who then would be responsible and be more likely not to abuse this power.”²⁴⁸ The first group lost, receiving only three votes.²⁴⁹ Based on the pardon power provided in the Washington State Constitution, the Revised Code of Washington (“RCW”) authorizes the State Governor to grant pardons or reduce punishment.²⁵⁰ The RCW even allows the State Governor to issue an extraordinary release.²⁵¹ The RCW also establishes a Clemency and Pardons Board (“Board”) within the Governor’s Office.²⁵²

Washington State’s Constitution authorizes the Governor to grant pardons, but it also permits the legislature to limit this power through legislation. In article III section nine, Washington State’s Constitution states, “the pardoning power shall be vested in the governor under such regulations and restrictions as may be prescribed by law.”²⁵³ Under this Article, legislatures may restrict the pardon power by passing statutes.

Under the RCW’s section 9.94A.880, “[t]he clemency and pardons board is established as a board within the office of the governor.”²⁵⁴ The Board “shall receive petitions from individuals, organizations, and the department for review and commutation of sentences and pardoning of offenders in extraordinary cases, and shall make recommendations thereon to the governor.”²⁵⁵ Based on the RCW, the Board reviews pardon requests and recommends eligible pardon requests to the governor.²⁵⁶ The Board can also receive pardon requests from individuals or organizations, who lost their civil rights because of “committed federal offenses or out-of-state felonies.”²⁵⁷ However, the RCW’s establishes procedural limitations by stating, “[t]he board shall not recommend [to] governor [to] grant clemency . . . until a public hearing has been held on the petition.”²⁵⁸ This RCW provision

248. *Id.*

249. *Id.*

250. WASH REV. CODE § 9.94A.728 (1974).

251. *Id.*

252. WASH REV. CODE § 9.94A.880 (1974).

253. WASH. CONST. art. III, § 9.

254. WASH REV. CODE § 9.94A.880 (1974).

255. WASH REV. CODE § 9.94A.885 (1974).

256. *Id.*

257. *Id.*

258. *Id.*

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indirectly limits the Board and the governor's power by preventing the Board from recommending pardons and the governor from granting pardons without a hearing process, which is clearly mentioned in the Bylaws.²⁵⁹

3. Clemency and Pardons Board: A Closer Look

The Clemency and Pardons Board is established as a committee within the Governor's Office.²⁶⁰ The Board consists of five members who are appointed by the governor and approved by the Senate for four-year terms.²⁶¹ They choose their chairman and vice-chairman, and adopt bylaws to manage all pardon procedures and processes.²⁶² According to the Board's bylaws, the Department of Corrections, organizations, and every individual can request a pardon review or commutation sentences.²⁶³ The Board must hold quarterly hearings,²⁶⁴ but the Governor, the Board's Chairperson, or a Board majority can request a special hearing at any time.²⁶⁵

Notably, the Governor has authority to either accept a Board recommendation or reject it.²⁶⁶ The Board uses specific steps to determine whether to recommend a pardon case to the Governor.²⁶⁷

Before the Board conducts a hearing, a pardon petition is reviewed by the "Preliminary Review Committee," which consists of two Board members.²⁶⁸ According to the Board's bylaws, the Chairman authorizes "Preliminary Review Committees" to determine "whether a petition will [provide] for hearing to the full Board."²⁶⁹ If one

259. *See id.*

260. WASH REV. CODE § 9.94A.880 (1974).

261. *Id.* §§ 1, 2.

262. *Id.* § 3.

263. CLEMENCY AND PARDONS BOARD, BYLAWS OF THE WASHINGTON STATE CLEMENCY AND PARDONS BOARD, art. 1 § 2 (Mar. 22, 2011).

264. *Id.* art. 3 § C.

265. *Id.* art. 3 § C.

266. *Washington Clemency & Pardons Board Policies*, *supra* note 17. at 1.

267. CLEMENCY AND PARDONS BOARD, BYLAWS OF THE WASHINGTON STATE CLEMENCY AND PARDONS BOARD, arts. 2 § 11, 3 §§ 1-2 (Mar. 22, 2011).

268. *Id.* art 3.

269. *Id.* art. 2 § 11.

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Preliminary Review Committee member votes in favor of the pardon petition, the Board will conduct a full hearing.²⁷⁰

The Board conducts regular and special hearings. Regularly hearings are held quarterly and are open to every individual.²⁷¹ Special hearings can only be held when “[t]he Governor, the Board’s Chairperson, or a majority of the Board may call.”²⁷² After the Preliminary Review Committee agrees to conduct a hearing, the full Board hears the parties’ statements and presentations.²⁷³ After the Board hears all statements, it deliberates and decides whether or not to recommend a pardon petition to the Governor.²⁷⁴ During public hearing deliberations, each Board member will vote and explain his or her reasons for the recommendation.²⁷⁵ Then, the Board will submit a non-binding recommendation to the Governor.²⁷⁶

4. *Lessons from the Washington Approach*

Washington’s policies and general approach provide a good model for criminal rehabilitation and generally promote justice, including the rule of law. Most importantly, Washington’s model shows how a government can strengthen and support its justice institutions, while pardoning individuals whose presence in prison is not necessary. Washington’s approach allows prisoners to rejoin the community with encouragement and forgiveness. Unlike Afghanistan, Washington’s approach provides clear checks on executive power, and prevents corruption. Afghanistan may benefit to set up an independent board, like the Washington Clemency and Pardoning Board, to review pardons or reduce punishment requests. Afghanistan could also emulate Washington’s pardon process by processing pardon requests at the central level.

270. *Washington Clemency & Pardons Board Policies*, *supra* note 17, at 3.

271. *Id.* art. 3 §§ 1, 2.

272. *Id.* art. 3 § 2.

273. *Id.* art. 2 § 11.

274. *Id.* art. 1 § 2.

275. *Washington Clemency & Pardons Board Policies*, *supra* note 17, at 5.

276. *Id.*

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III. RECOMMENDED CHANGES TO THE AFGHAN APPROACH
ON PARDONS

Despite their differences, both Iran and Washington State have clear and detailed laws and procedures that could help Afghanistan's legislators seek solutions to corruption and to the President's abuse of pardon power. First, the Afghan Constitution should modify the scope and purpose of the President's power to pardon convicted criminals. Second, the ACPA should define the limits on the President's pardon power and establish The Board of Pardoning and Reducing Punishment (the "Pardon Board"). Finally, to implement this power and authority, Afghanistan will need a regulation that particularly describes the pardon process's methods and mechanisms, as well as the structure and authority of the Pardon Board.

To implement the above suggestions, Afghanistan's Government first needs to amend its Constitution to modify and limit the scope of the President's pardon power. Then, Afghanistan needs to enact statutes that modify the Constitutional pardon power and establish an independent board that defines the scope of the President's pardon power. Finally, the Afghan Government needs to authorize the Pardon Board to recommend pardons or punishment reductions to the President in accordance with regulations passed by the Pardoning Board.

A. Amending Afghanistan's Constitution to Modify the Scope and Purpose of the President's Pardon Power

This article recommends for Afghanistan to amend Article 64 §18 of its Constitution to clarify the President's pardon power, like Washington State. Currently, Afghanistan's Constitution authorizes the President to grant pardons or reduce punishments, but its broad language fails to provide specific processes and procedures. This language should be specifically changed to narrow and define the scope of the President's power. Further, Afghanistan should establish a pardon board and enact statutes that details the process and mechanism for pardons. Afghanistan's Constitution should also incorporate provisions that permit every individual or convicted relative to request pardons or punishment reductions. Finally, Afghanistan should pass an amendment to authorize the House of Representatives to ratify and impeach members of the Pardon Board. By making these changes,

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Afghanistan can limit presidential corruption through the pardon power.

B. Amending the Afghan Criminal Procedure Act to Define the Limits of the President's Pardon Power

Like Washington's approach, an ACPA amendment should be adopted to establish the Pardon Board and modify procedures, clarifying who can request a pardon under specific conditions and circumstances. Following Iran and Washington's approach, the ACPA should allow every individual, his relatives, and his attorney to seek pardons or punishment reductions. Afghanistan should amend ACPA article 348, which states, "[a] pardon shall be carried out by the decree of the president," and change it to Washington's approach. This approach would change Afghanistan's system by providing the Pardon Board sole authority to recommend a pardon and the President may only ratify or reject it.²⁷⁷ Finally, like Washington's Revised Code, the ACPA should authorize the Pardon Board to adopt regulations that specifically outline all pardon procedures and mechanisms, and the duties and responsibilities of Pardon Board members.

To accomplish all the above recommendations, the second section of Article 348 must also be amended. As stated above, this section states, "[a] pardon shall not dismiss consequential and complementary punishments and security measures and consequences of criminal charges and does not affect previously applied punishments unless the issued pardon decree states otherwise."²⁷⁸ This language should be changed because it gives the President broad authority and allows him to abuse his power. Furthermore, this language has blurred the distinctions between *pardon* and *restoring prestige*. Restoring the prestige under Afghanistan's laws means a person convicted "due to a felony or misdemeanor may be eligible" to request to restore their prestige "after full enforcement of the . . . punishment or being pardoned."²⁷⁹ The Court only grants this restoration for felonies after six years and for misdemeanors after three years.²⁸⁰ Therefore, the

277. *Washington Clemency & Pardons Board Policies*, *supra* note 17 art. 3 §§ 1, 2.

278. *See 2014 Criminal Procedure Act*, *supra* note 6, art. 348 § 2.

279. *Id.* art. 362.

280. *Id.*

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language in ACPA's article 348 section 2 authorizes the President to pardon "previously applied punishments" by issuing a pardon decree which "states otherwise." Therefore, this language should be amended to prevent the president from further imposing his authority over the judiciary.

C. Creating a Pardon and Punishment Reduction Board

In accordance with modifying Afghanistan's Constitution and ACPA, the Pardon Board should be empowered to establish rules that define who may examine pardon cases and how punishment should be reduced. The Pardon Board should also have authority to determine whether a pardon should be recommended to the President in a way that does not undermine the judiciary system. Pardon Board recommendations should also focus on helping a convicted person return as a productive member of society. Through these recommendations, the Board could arrange for and ratify regulations, administrative structures, professional and administrative meetings, and plans and strategies. The authority would permit the Pardon Board to effectively implement pardons and punishment reductions. However, the Pardon Board's regulations should clearly state how pardon cases should be examined, how many ordinary meetings should occur every year, what circumstances can convict, and how other involved parties bring petitions to the Pardon Board.

Moreover, Pardon Board regulations should also clarify the duties and responsibilities of the Pardon Board's members, the conditions for member dismissal, and the appointment of a Pardon Board member. Like Washington's approach, the regulations should also consider the members' right to vote and how it should be exercised, and the process for policy-making.

Lastly, to successfully implement all these recommendations, Afghanistan's Board should have a legal structure with knowledgeable members, a defined authority, a specific policy-making mechanism.

1. Structure and Framework

Afghanistan's Pardon Board structure should involve two tiers. The first tier should be modeled after Washington's Board, as an independent board in the capital city of Kabul (the "Central Board").

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The second tier should be modeled after Iran's Provincial Commissions which are set in each of the provinces (the "Provincial Board").

Like Washington's approach, Afghanistan's Central Board members could be nominated by the President, Council of Ministers or the President's Cabinet. Then, the Wolesi Jirga, or House of Representatives, will ratify the Board nominations. Afghanistan's Central Board could have seven members. Like Washington, the Central Board members could choose their chairman and vice-chairman among their members. However, the chairman and vice-chairman's terms should be limited to one year, which is slightly different from Washington because it is not clearly mentioned in the Washington Board's bylaws. Additionally, the Central Board would have ordinary meetings on occasional events that are clearly laid out in the ACPA.²⁸¹ This is again slightly different from Washington, because the Washington Board consists of five members that hold ordinary meetings quarterly.²⁸²

As for provincial commissions, each province could have five members who are nominated by the Central Board and ratified by the President. This is slightly different from Iran's model because the Iran's regulation states that the provincial commission's members are selected from local officials.²⁸³ Afghanistan's Provincial Board, like the Central Board, should also choose their chairman and vice-chairman for a one-year term. The Provincial Board's decisions may be sent to the Central Board for uniformity. From there, both boards' decisions could be sent to the President.

The proposed process for Afghanistan would be partially similar and partially different from Iran's model. In Iran, the Provincial Commission sends their decision to the Central Commission for uniformity, then the Central Commission refers the decision to the Supreme Leader, not the President.²⁸⁴ However, both of Afghanistan's Central and Provincial Boards could have administrative support that prepares documents and evidence for the Board and informs all parties about the hearing process and meetings. This administrative support system would emulate Washington and Iran's models.

281. See *2014 Criminal Procedure Act*, *supra* note 6, art. 354 (1-5).

282. WASH REV. CODE § 9.94A.880 (1974).

283. *2008 Iranian Pardoning Regulation*, *supra* note 9, art. 4.

284. *Id.* art. 15.

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2. *Qualification and Selection of Members*

The Central Board's members could be nominated by the President, Council of Ministers or Cabinet. This nomination could be ratified by House of Representative for a term of three years. However, Central Board members should have at least five years of judicial experience and have a bachelor's degree in civil law or Sharia Law.

The Iranian and Washington State models have several similarities and differences with regard to nominations. In Washington, the Governor nominates Board members for four-year terms and the Senate ratifies the Governor's nomination.²⁸⁵ Washington's Board only requires its members to be a registered voter in the State.²⁸⁶ In contrast, the Iran Central Commission members need to serve as judges for at least ten years and they must be familiar with Islamic law.²⁸⁷ Moreover, the Chief of Justice selects Iran's Central Commission members.²⁸⁸

Washington State's approach should be a good model for Afghanistan's Central Board. Similarly, Afghanistan's Central Board should nominate the Provincial Boards' members to the President, but the Provincial Board's members should also have the same qualifications as the Central Board. After the President ratifies a Provincial Board member's nomination, that member may work independently. This would be different from Iran's model, where regulations sets forth the Provincial Commission's member selection process.

3. *Authority and Responsibility*

Like Washington and Iran's laws, the ACPA and Pardon Board regulations should govern the authority and responsibilities of the Pardon Board members. Generally, the ACPA or Board regulations would authorize the Pardon Board to review all pardons or punishment reduction requests on special occasions or events. Under either the ACPA or Pardon Board Regulations, the Pardon Board would also

285. WASH REV. CODE § 9.94A.880 (1974).

286. CLEMENCY AND PARDONS BOARD, BYLAWS OF THE WASHINGTON STATE CLEMENCY AND PARDONS BOARD, art. 2 § 4 (Mar. 22, 2011).

287. 2008 Iranian Pardoning Regulation, *supra* note 9, art. 2.

288. *Id.* arts. 2, 3.

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consider the particular and specific circumstances that are proper or improper to recommend pardons to the President.

In Iran and Washington, commissions and boards are responsible for hearing pardon or punishment reduction petitions at specified time periods before recommending them to the authorized person. Washington's board holds its hearings quarterly;²⁸⁹ while Iran's commissions hold their meetings every fifteen days.²⁹⁰ These models will be different from the recommendations for Afghanistan, because ACPA specifies five events that permit the President to issue pardons or punishment reductions. Therefore, the Pardon Board may hold their meetings according to ACPA's provisions.

To maintain authority, Pardon Board members must have independence. The President must not have the power to dismiss Pardon Board members unless the members commit a crime. The Pardon Board may hear all types of pardon and clemency cases. However, Pardon Board members will not receive a salary for their services. Instead, Afghanistan's government will pay for their transportation when they come for regular or special meetings. This is also like the Washington Clemency Board.

4. *The Board's Pardon Process*

Washington State and Iran are also great models for the Pardon Board's procedures. Washington State's Board has a preliminary committee within that is responsible to review the petitions before a full board hearing. This design provides Afghanistan with a very important model for its own pardon or punishment reduction process.

Further, by amending Afghanistan's law to emulate Iran and Washington State, any convicted person may have the right to ask for pardons or punishment reductions. Like Washington and Iran's laws, convicted persons must have the right to file a petition requesting for either a pardon or punishment reduction. Like Washington's approach, petitioners should be able submit their petitions to the Pardon Board at least one month before the scheduled hearing dates, which are specified events under the ACPA. The Preliminary Committee could review all documents and match the pardons or punishment reductions with

289. Bylaws of Clemency and Pardons Board, *supra* note 17, art. 3 § 7.

290. 2008 Iranian Pardoning Regulation, *supra* note 9, art. 15.

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conditions or circumstances. Then, if the petitions meet the conditions or at least provide all the necessary documents, the Preliminary Committee will recommend the pardons to the entire Pardon Board for a hearing. Like Washington's approach, the board will publicly hold the meeting and decide whether to recommend a pardon.

5. *The Possible Challenges*

This approach potentially could face many challenges, including concerns about the President and executive officials losing power and authority. President Ghani believes in a strong and powerful central government, and he has emphasized this position by criticizing other governments and powers. Therefore, President Ghani will not accept any idea that would limit the pardon power. Corrupt officials also will try to prevent regulatory mechanisms on the pardon power because such mechanisms will prevent them from engaging in corruption or abusing the pardon power. Moreover, some people will challenge any proposal that advocates for individuals to work without a salary. Finally, Afghanistan's corrupt and unjust judiciary system would either prevent or at least hinder any proposal to modify pardon procedures.

CONCLUSION

Throughout human history, "pardon and forgiveness" has been recognized through religion, custom, social principles, and socio-political norms. In the field of legislation, some scholars believe the recognition of pardons can be traced from Hammurabi's Code to the laws of the United Kingdom and the United States of America. In Islamic countries, the source of pardon and forgiveness has been tied to religious teachings. The Qur'an explicitly recommends the use of pardon and forgiveness. Although the pardon power has been associated with compassion and kindness, this power has been used for the social and political interests of rulers, like kings and presidents in Afghanistan.

Over the past eighteen years, the pardon power has undermined the rule of law and has occasionally eradicated judicial systems. The pardon system is necessary in every society, especially in places like Afghanistan where there is a corrupt and weak judicial system. Therefore, societies must take into account the legitimate use of pardons.

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Although the Afghanistan Constitution authorizes the President to use pardons, he has not been able to regulate this power. Thus, by amending Afghanistan's Constitution and the ACPA, Afghanistan can regulate the presidential pardon power. The amendments should specify the crimes that the President can pardon and create a body that examines pardon requests and determines which offenders are ready for prison release.

To improve its pardon process, Afghanistan should establish committees and procedures based on Iran and Washington State's model. Iran and Washington State's procedures effectively prevent the pardon power from being used for corruption. Without corruption, the pardon power cannot undermine Afghanistan's judicial system. Further, an efficient pardon system allows the release of individuals who do not need to be in prison anymore, decreasing government spending. Afghanistan can become a more efficient and prosperous country by simply amending its procedures for pardons and punishment reductions.